

REMARKS

Claims 10-25 are now pending in the application. The amendments to the claims contained herein are not a narrowing amendment. The Examiner is respectfully requested to reconsider and withdraw the rejection(s) in view of the amendments and remarks contained herein.

REJECTIONS UNDER 35 U.S.C. § 102 AND 35 U.S.C. § 103

Claims 10-11, 13-14 and 18-19 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Allum (U.S. Pat. No. 6,063,046). Claim 12 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Allum (U.S. Pat. No. 6,063,046) in view of an obvious design choice. Claims 15 and 20 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Allum (U.S. Pat. No. 6,063,046) in view of Orman et al. (U.S. Pat. 4,785,674). Claims 16-17 and 21-25 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Allum (U.S. Pat. No. 6,063,046) in view of Girone et al. (U.S. Pat. No. 6,162,189). These rejections are respectfully traversed.

The Advisory Action indicates that certain language of independent Claim 10 has been treated as merely functional recitations, rather than providing structural features of the claimed device. Applicants disagree that the identified language of the claims was not structural. Nevertheless, Applicants have amended independent Claim 10 so that there can be no doubt that the identified language of the claims is **structural**, and **not** merely functional. For example, Claim 10 recites “the kinetic model analyzer being **configured to determine a target rotation** angle at which the force applied to said plate by said user is in balance with the rotating force of said motor.” (Emphasis

added.) Additionally, Claim 10 recites “a motor controller **configured to control said motor** so that said plate is tilted at said target rotation angle determined by said kinetic model analyzer in accordance with a predetermined kinetic model.” (emphasis added.)

The Advisory Action further indicates it is the Examiner’s view that the device of the Allum reference is “**inherently capable of**” accomplishing the functions identified above. Applicants respectfully point out that whether a device is “capable of” acting in a certain way is not the proper standard for inherency. It is well settled that “[i]nherency, however, may not be established by **probabilities or possibilities**. The mere fact that a certain thing **may** result from a given set of circumstances is not sufficient.” *In re Oelrich*, 666 F.2d 578, 581 (C.C.P.A. 1981) (quoting *Hansgirk v Kemmer*, 102 F.2d 212, 214 (C.C.P.A. 1939) (emphasis in original). Similarly, the fact that a prior art reference is **capable of** being modified to fall within the scope of the claims is not sufficient to support anticipation of the feature based on inherency. *In re Robertson*, 169 F.3d 743, 745. Cir. 1999).

Furthermore, when a rejection is based on inherency, the Examiner must identify the page and line of the prior art that justifies the rejection. See, e.g., *Ex parte Schricker*, 56 USPQ2d 1723, 1725 (B.P.A.I. 2000) (unpublished). In addition, the rejection must include an explanation and any necessary extrinsic evidence, which “must make clear that the missing descriptive matter is **necessarily present** in the thing described in the reference, and that it would be so recognized by persons of ordinary skill. *Continental Can Co. U.S.A. v. Monsanto Co.*, 948 F.2d 1264, 1268 (Fed. Cir. 1991). (emphasis added)

In the present case, Applicants do not agree that the device of Allum is configured to be capable of operating as recited in Claim 10. Specifically, “making calculations regarding a change in the center of foot pressure does not even suggest that the device of Allum is **“configured to determine a target rotation angle** at which the force applied to said plate by said user is in balance with the rotating force of said motor” as recited in Claim 10. Determining **actual** changes in the center of foot pressure differentials is wholly unrelated to determining a **target** rotation angle. Further, Applicants believe there is no disclosure in Allum that perturbing the stance of the subject is based upon **any calculation** done by the device, rather than simply a pre-set program.

Nor is there any disclosure in Allum that the device includes “a motor controller **configured to control** said motor so that said plate is tilted **at said target rotation angle determined by said kinetic model analyzer** in accordance with a predetermined kinetic model.” Applicants believe the feedback-type model disclosed in Allum involves **measuring** the tilt angle generated **by the user** rather than the device **causing** any predetermined tilt angle. Thus, Applicants respectfully assert that Allum does not disclose or suggest a device configured as recited in Claim 10.

Moreover, Allum certainly does not disclose a device that is **necessarily** configured as recited in Claim 10 as required to support an inherency finding. Applicants respectfully assert that, for the Examiner to maintain these rejections, a complete explanation **detailing** how the disclosure and any required extrinsic evidence shows that the device of Allum is **necessarily configured** as recited in independent Claim 10, since this has not been provided. Because Applicants believe the Allum

device is not necessarily configured as recited in Claim 10, Applicants respectfully assert that these rejections should be withdrawn.


Since each of the pending rejections relies upon Allum as anticipating the features discussed above, Applicants respectfully assert that the invention of Claim 10 is neither disclosed nor suggested by the cited prior art, either singly or in combination. Since each of the remaining claims depend from independent Claim 10, directly or indirectly, Applicants respectfully assert that they are likewise patentable for at least the reasons discussed above.

CONCLUSION

It is believed that all of the stated grounds of rejection have been properly traversed, accommodated, or rendered moot. Applicant therefore respectfully requests that the Examiner reconsider and withdraw all presently outstanding rejections. It is believed that a full and complete response has been made to the outstanding Office Action and the present application is in condition for allowance. Thus, prompt and favorable consideration of this amendment is respectfully requested. If the Examiner believes that personal communication will expedite prosecution of this application, the Examiner is invited to telephone the undersigned at (248) 641-1600.

Respectfully submitted,

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